Supreme Court, U.S.
FILED
FEB 15 2000

(2)

No. 99-1099

IN THE

Supreme Court of the United States

OLUFEMI ANTHONY LUKAN,

Petitioner,

v.

GLORIA SCOTT, Individually and as Superintendent of the North Forest Independent School District and L. V. BRISCO, Individually and as Deputy Superintendent of the North Forest Independent School District,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly decided this case.

II. Whether the decisions of the Courts of Appeals conflict in their interpretation of *Crawford-El v. Britton*, 523 U.S. 574 (1998).

III. Whether the Court should review a constitutional issue arising from an interlocutory order and prior to the rendition of a final judgment.

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Appendix — Order Of The United States District Court For The Southern District Of Texas, Houston Division Dated December 12, 1998 . . . 1a

OPINIONS BELOW

The District Court's December 12, 1998, Order denying Respondents' Motion for Summary Judgment asserting the defense of qualified immunity to Petitioner's First Amendment retaliation claim is set out at App. 1a of the Appendix. The July 28, 1999, opinion of the Fifth Circuit in this matter, as well as the September 27, 1999, Order of the Fifth Circuit denying Respondent's Petition for Rehearing, are both set out in the Appendix to Petitioner's Petition For A Writ of Certiorari at App. 1-11.

STATEMENT OF THE CASE

SUMMARY OF THE REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The Fifth Circuit correctly decided this case because Petitioner's summary judgment evidence "fail[ed] to establish a causal connection between the speech and the adverse employment actions that he alleges." *Lukan v. North Forest Indep. Sch. Dist.*, 183 F.3d 342, 346 (5th Cir. 1999). The decisions of this Court establish that a necessary concomitant to the threshold immunity question is the determination of whether the plaintiff has asserted the violation of a constitutional right at all. Contrary to Petitioner's assertion, the Fifth Circuit did not impermissibly "weigh the evidence" in reaching this result. Rather, the Fifth Circuit merely followed the procedure set forth by this Court in *Johnson v. Jones*, 515 U.S. 304 (1995), which requires the Court of Appeals to undertake a review of the record in interlocutory qualified immunity appeals where the District Court makes no fact findings as to the reasons for denying a summary judgment motion.

2. There is no conflict in the decisions of the Courts of Appeals. While the Courts of Appeals predictably reach different outcomes based on the specific facts of each case cited by Petitioner, there is no inconsistency in the application of the rule announced in *Crawford-El v. Britton*, 523 U.S. 574 (1998). Petitioner confuses the *Crawford-El* holding concerning the proof requirements in a motive-based constitutional case with the jurisdictional limitations on interlocutory appellate review. However, the Courts of Appeals are not confused, and the holdings in the cases relied upon by Petitioner reflect complete adherence to both the *Crawford-El* and *Johnson* opinions.

3. Similarly, as the Fifth Circuit's decision was based on undisputed facts and addressed only questions of law, Petitioner's third argument in support of certiorari — that he was deprived of his Seventh Amendment guarantee of trial by jury — is equally meritless. *See Johnson*, 515 U.S. at 313-14 (finding that an order is purely legal when it concerns only the application of established legal principles to a given set of facts); *Lukan*, 183 F.3d at 345 ("As we are addressing conclusions of law, we may exercise appellate jurisdiction over this interlocutory appeal.").

4. The procedural posture of this case suggests that the Petition for Writ of Certiorari should not be granted. Allowing this case to proceed to final disposition below might make it unnecessary for this Court to address constitutional questions at this stage of the litigation.

PROCEDURAL HISTORY

Petitioner filed suit in September 1997 in state district court against the North Forest Independent School District ("NFISD"), Gloria S. Scott and L. V. Brisco, alleging that he was a victim of certain adverse employment actions brought about by his speech on matters of public concern. Petitioner asserted a free speech retaliation claim under 42 U.S.C. § 1983 and a state law claim under the Texas Whistleblower Act. After removing the case to federal district court, the Defendants filed a motion for summary judgment. Defendants Scott and Brisco asserted the defense of qualified immunity. On December 12, 1998, the District Court denied Defendants' motion, stating only that "there are several material fact issues, which necessitate a trial for their proper resolution." App. at 1a. Scott and Brisco filed their Notice of Appeal on December 18, 1998.

On July 28, 1999, the Fifth Circuit reversed the District Court's Order on the grounds that Petitioner failed to establish a causal connection between his speech and the adverse employment actions of which he complains. The Court of Appeals also found that Scott and Brisco would have taken the same action regardless of Petitioner's speech. Thereafter, the Fifth Circuit denied Petitioner's request for a stay of the mandate, and remanded the case to the District Court.

FACTS

The pertinent factual background is set forth in the Opinion of the Court of Appeals. However, certain of the undisputed material facts are discussed below to expedite the Court's understanding and disposition of this matter.[1]

Petitioner served as NFISD's Internal Auditor from 1989 until July 1996. In April 1996, Scott became NFISD's Superintendent. As the new Superintendent, Scott commissioned an independent audit of the NFISD finances and reorganized the entire NFISD administrative office in July 1996. As part of that reorganization, Scott appointed Petitioner to the newly created position of Director of Financial Services. In August 1996, Petitioner claims that he reported certain suspected financial improprieties in the NFISD Business Office to the Texas Education Agency ("TEA").

In September 1996, Scott received the independent audit report which was critical of the entire Business Office staff, including Petitioner and Brisco — NFISD's Deputy Superintendent for Administration and Fiscal Planning. The report concluded by recommending that the District conduct an extensive search for a Chief Financial Officer, and that the District reorganize its Business Office.

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1. The "Facts" section of the Petition consists primarily of a recitation of the underlying reasons why Petitioner spoke out on a matter of public concern and how his speech allegedly motivated Scott and Brisco against him. Consideration of these "facts" is unnecessary, as Respondents conceded for purposes of appeal that Petitioner spoke out on a matter of public concern. Further, while the Fifth Circuit recognized that Petitioner "suggested" that Scott had a motive to retaliate against him "because of his speech," the undisputed material facts established conclusively that there was no causal connection between Scott's alleged motive and the adverse employment actions of which he complains.

In October, 1996, the TEA sent a team of auditors to the District to investigate. Although the TEA did not issue a "formal" report at the conclusion of its visit to the District, it did provide Scott with "informal" notes of its findings that stated that the District was in a "worsening fiscal situation."

The TEA once again visited the District in April 1997 to assist it in determining its current budget status. The TEA sent a letter to the District following the visit which cited several financial management issues that the District needed to address, and recommended that NFISD hire financial consultants "as soon as possible" and reorganize its financial management operations. In response, the District hired two school district financial consultants recommended by the TEA — Jerry Keeble and Bill Outlaw. Over the next four months Keeble and Outlaw attempted to correct the multitude of problems in the District's Business Office. Both Keeble and Outlaw thought that the District's financial records were "the worst they had ever seen," and that Petitioner — as Director of Financial Services — was directly responsible for this situation.

The District also followed the TEA's recommendation and reorganized its Business Office in June 1997. As part of that reorganization, the District created a Chief Financial Officer position, reinstated the Internal Auditor position, and created a Director of Fixed Assets position. Petitioner initially applied and interviewed for the Chief Financial Officer position in June 1997 along with five other candidates. Each candidate was interviewed by a four-member committee consisting of Mr. Outlaw, Mr. Roy Ford — NFISD Assistant Superintendent for Human Resources & Staff Development, Elaine Berry Ed.D. — NFISD Associate Superintendent for Curriculum & Instruction, and

Scott. Brisco did not sit on the interview committee or otherwise participate in the interview process. The candidates were numerically ranked by each interview committee member based on a series of identical questions posed to each candidate. Numerical tabulations from the interview committee ranked Petitioner third out of the six candidates for CFO. Scott's individual tabulations also ranked Petitioner third out of the six candidates. Without Scott's scores, Petitioner would have ranked *fourth* out of the six candidates. Mr. Jimmie Young received the highest overall score from the interview committee. Scott recommended to the NFISD Board that Mr. Young be selected as the CFO. Mr. Young was hired by the Board on June 30, 1997.

Since the CFO's responsibilities more than encompassed the Director of Financial Services position, that position was dissolved and Scott reassigned Petitioner to the position of Director of Fixed Assets — a position with the same compensation and rank (Director) as Director of Financial Services, the position he previously held.

Petitioner then applied and interviewed with two other candidates for the Internal Auditor position in August 1997. Scott gave Petitioner the highest score out of the five[2] interview committee members. However, Petitioner received the lowest total score from the interview committee. Scott

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2. Mr. Keeble had to leave the CFO interview process prematurely in order to attend a funeral. Therefore, his scores were not used in the final recommendation process for CFO, and the "interview committee" consisted of only four individuals. Mr. Keeble was able to participate in the entire recommendation process for Internal Auditor, and therefore the "interview committee" consisted of five individuals.

once again recommended the highest-ranking candidate to the NFISD Board, and Mr. Melvin Waits was hired by the Board as the new Internal Auditor in August 1997.

The only member of the interview committee accused by Petitioner of retaliating against him is Scott. None of the other members of the committee are alleged to have retaliated against Petitioner, or to have even known that Petitioner was making complaints to TEA. The month after Mr. Waits was hired as the Internal Auditor, Petitioner filed this lawsuit.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 states that a petition for a writ of certiorari "will be granted only for compelling reasons." One situation that the Court considers compelling is where two or more Courts of Appeals have entered conflicting decisions "on the same important matter." SUP. CT. R. 10(a) (1999). At least one commentator has suggested that a conflict must not only be compelling and important — it must also be "intolerable." ROBERT L. STERN, SUPREME COURT PRACTICE § 4.3 (6th ed. 1985). While the Court has not specifically defined what conflicts it regards as "compelling" and "important," it seems clear that it will only review those cases presenting the most recurring and substantial conflicts on issues of the utmost importance to the general public. As demonstrated below, this case is not worthy of review by this Court.

I. The Fifth Circuit Correctly Decided This Case.

The Fifth Circuit employed the correct legal analysis to determine that Scott and Brisco were entitled to qualified immunity in this case. First, the Fifth Circuit correctly

observed that if a public official's conduct did not violate a clearly established constitutional right, the official is entitled to qualified immunity. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (noting that "the determination of whether the plaintiff has asserted a violation of a constitutional right at all" is a "necessary concomitant" to the threshold immunity question). Second, the Fifth Circuit followed the procedure required by this Court's opinion in *Johnson v. Jones*, 515 U.S. 304 (1995), when a District Court denies summary judgment based on qualified immunity without indicating its reasons for doing so. In such a situation, the Court of Appeals must undertake a review of the record to determine what facts the District Court, in the light most favorable to the non-moving party, likely assumed. Upon reviewing the record, the Fifth Circuit found that the material facts were not in dispute, and that: (1) Petitioner's evidence failed to establish a causal connection between the speech and the adverse employment actions as he alleges; and (2) even if Petitioner established that his speech motivated Scott and Brisco's conduct, they would have taken the same action.

Petitioner erroneously accuses the Fifth Circuit of ignoring the limitations on its jurisdiction by improperly weighing the evidence.[3] However, the Fifth Circuit did not impermissibly weigh the evidence. The Court of Appeals simply noted that the record was devoid of any evidence concerning a material element of Petitioner's underlying constitutional claim; to wit, causation. The Fifth Circuit essentially assumed that Petitioner had met his burden of raising a fact issue as to Scott's motivation. However, as noted in the opinion, the only "evidence" adduced by Petitioner that the interview committee process was tainted

3. Notably, Petitioner did not raise the jurisdictional issue until he filed his Petition for Rehearing in the Court of Appeals.

was his argument that Scott had the opportunity to make negative comments and direct the interview committee to select other candidates. This is pure speculation and amounts to no evidence at all that the interview committee retaliated against Petitioner. By failing to offer any evidence that the interview committee was improperly influenced by Scott, Petitioner "failed to establish a causal connection between his speech and the alleged retaliatory conduct."

Petitioner's argument that the Fifth Circuit impermissibly weighed the evidence is based upon an apparent misunderstanding of the relationship between this Court's opinions in *Crawford-El, Johnson,* and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). A brief examination of the holdings in these cases discloses that the Fifth Circuit's decision in this case does not conflict with precedent from this Court, and that this case was correctly decided.

In *Crawford-El*, this Court held that when a plaintiff brings a constitutional action against a government official for damages, and the official's improper motive is a necessary element of the claim, the plaintiff is not required to present clear and convincing evidence of improper motive in order to defeat the official's motion for summary judgment. In reaching this conclusion, the Court made several observations which are particularly applicable to the case at bar. First, the Court noted that the qualified immunity test is essentially an objective legal one, and proof of subjective intent is largely irrelevant to its application. Thus, the Court found no support for the Court of Appeals' holding that a heightened standard of pleading or proof should be required to defeat a claim of qualified immunity in a motive-based constitutional case.

Second, while noting that evidence of improper motive is irrelevant on the issue of qualified immunity, *Crawford-El* recognized that it may be an essential component of the plaintiff's affirmative case. However, the Court expressed the view that the heightened pleading/proof standard advocated by the Court of Appeals was unnecessary, because existing law already provides for the summary disposition of insubstantial motive-based constitutional claims:

> Even when the general rule has long been clearly established (for instance, the First Amendment bars retaliation for protected speech), the substantive legal doctrine on which the plaintiff relies may facilitate summary judgment in two different ways. First, there may be doubt as to the illegality of the defendant's particular conduct (for instance, whether a plaintiff's speech was on a matter of public concern). Second, at least with certain types of claims, *proof of an improper motive is not sufficient to establish a constitutional violation -- there must also be evidence of causation.*

Crawford-El, 118 S. Ct. at 1594 (emphasis added) (citation omitted).

It is ironic that Petitioner places principle reliance on *Crawford-El*, because he is advocating the adoption of a rule that was expressly rejected by the Court in *Crawford-El* — that proof of motive alone is sufficient to establish a constitutional violation. From the outset, Petitioner has attempted to bootstrap his allegations of motive to satisfy his burden of proving a constitutional violation. Petitioner's argument regarding Brisco serves to underscore the absurdity

of the result he proposes. Petitioner presented absolutely no evidence that Brisco had anything to do with the process of selecting the CFO or Internal Auditor candidates. Yet Petitioner continues to insist that he is entitled to proceed to trial against Brisco because he raised a fact issue as to Brisco's motive. This result is not mandated by the holding in *Crawford-El.*

In *Johnson v. Jones*, this Court rejected the argument that the policies behind the immunity defense justify interlocutory appeals on questions of evidentiary sufficiency. The Court concluded that a defendant, entitled to invoke a qualified immunity defense, may not appeal a District Court's summary judgment order "insofar as that order determines whether or not the pre-trial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 319-20. However, as in the case at bar, when a District Court denies summary judgment based on qualified immunity without indicating its reasons for doing so, this Court acknowledged that "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the non-moving party, likely assumed." *Id.* at 319.

Although the principle basis of the Fifth Circuit's opinion in this case is Petitioner's failure to establish the causation element of his claim, the alternative holding is based upon the rule established in *Mt. Healthy* concerning the elements of a First Amendment retaliation claim. Under the rule announced in *Mt. Healthy*, if a plaintiff carries his burden of establishing that he suffered an adverse employment decision because of his protected speech, the defendant may still prevail by showing that it would have taken the same action against the plaintiff even in the absence

of the protected conduct. *See Mt. Healthy*, 429 U.S. at 283-87. Petitioner accuses the Fifth Circuit of erroneously relying on *Mt. Healthy* to create a new "second prong" to the qualified immunity test.[4] In reality, the Fifth Circuit's reliance on *Mt. Healthy* is related to the threshold requirement that Petitioner establish a violation of his constitutional rights. It is undisputed that the school district in this case was in dire financial straits, that it received two independent recommendations to reorganize its Business Office, and that the interview committee which was established to select the candidates was unbiased. Based on these undisputed facts, the Fifth Circuit was able to conclude, under *Mt. Healthy*, that the same actions would have been taken regardless of Petitioner's protected speech.

It is apparent from the above that the Fifth Circuit's opinion in this case precisely conforms to the rules set forth in the opinions of this Court. The District Court denied summary judgment without indicating its reasons for doing so. Thus, the Fifth Circuit had to undertake a review of the record as required by *Johnson*. That review disclosed that the undisputed material facts in the record negated any inference that Petitioner's First Amendment rights were violated because: (1) there was no evidence in the record of a causal connection between his speech and the alleged

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4. Petitioner boldly asserts that the Fifth Circuit "added" a new prong to the qualified immunity test which asks whether the public official's conduct was "objectively reasonable." In fact, the objective reasonableness inquiry has been a part of the qualified immunity test since this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that qualified immunity shields government officials from individual liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

adverse employment actions; and (2) the undisputed evidence established that Scott and Brisco would have taken the same action regardless of Petitioner's speech. *Lukan*, 183 F.3d at 346-47.

By confining its decision to the undisputed material facts contained in the summary judgment record, the Fifth Circuit followed the mandate set forth by this Court in *Johnson*. Thus, Petitioner's second argument in support of certiorari —that the Fifth Circuit's decision violated the collateral order doctrine — is meritless because the rule announced in *Johnson* was based largely on this Court's analysis of the collateral order doctrine as it relates to qualified immunity appeals. As the Fifth Circuit merely applied procedures specifically authorized by *Johnson*, its decision did not violate the collateral order doctrine.

II. There Is No Conflict For The Court To Resolve.

Petitioner's primary basis for invoking the Court's jurisdiction is an alleged conflict among the Courts of Appeals in the interpretation of this Court's decision in *Crawford-El*. Specifically, Petitioner cites six cases — including the case at bar — that purportedly show a conflict "as to how [the Courts of Appeals] should regard factual disputes as to an official's intent in motive-based constitutional tort cases when the trial court denies qualified immunity and an interlocutory appeal is taken."

The Petition should be denied because there is no conflict among the Courts of Appeals in their interpretation of *Crawford-El*. In fact, four of the six cases identified by Petitioner, including *Lukan*, do not cite, interpret, or otherwise rely upon this Court's opinion in *Crawford-El* —

much less "diverge" in their interpretation of that case. *See Guilloty-Perez v. Fuentes-Agostini*, 196 F.3d 293 (1st Cir. 1999); *Davidson v. Chestnut*, 193 F.3d 144 (2nd Cir. 1999) (citing only the Court of Appeals' decision in *Crawford-El* on other grounds); *Lukan v. North Forest Indep. Sch. Dist.*, 183 F.3d 342 (5th Cir. 1999); *Butler v. City of Prairie Village, Kan.*, 172 F.3d 736 (10th Cir. 1999).[5] These cases merely apply correctly stated rules of law to their respective situations and predictably reach different outcomes based on the specific procedural posture and facts of each case. *See Guilloty-Perez*, 196 F.3d at 294 (declining jurisdiction on interlocutory appeal from the denial of qualified immunity where district court made specific finding that material fact issues existed concerning defendants' actions and motivations); *Davidson*, 193 F.3d at 150 (citing *Johnson* and declining review of "evidence sufficiency" issues on interlocutory appeal from the denial of qualified immunity where district court made specific findings regarding material fact issues concerning defendants' retaliatory motives); *Butler*, 172 F.3d at 746-47 (affirming district court's granting of qualified immunity where plaintiff failed to establish that his speech was a motivating factor behind the alleged retaliatory action).

The two remaining cases referenced by Petitioner cite *Crawford-El*, but they do not conflict. *Brown v. Cochran*, 171 F.3d 1329 (11th Cir. 1999) involved a race discrimination claim wherein the district court denied qualified immunity and the public official brought an

5. The Tenth Circuit's decision in *Butler* also does not support Petitioner's claimed conflict because it does not involve the denial of qualified immunity and subsequent interlocutory appeal, but rather the grant of qualified immunity and appeal after the complete disposition of plaintiff's case. *See Butler*, 172 F.3d at 743-45.

interlocutory appeal. The Eleventh Circuit cited *Crawford-El* for the general proposition that a plaintiff must identify affirmative evidence from which a jury could find improper motive in order to defeat summary judgment. *Id.* at 1332-33. After analyzing the record, the court found that the plaintiff had failed to establish a constitutional violation in the first instance because the undisputed material facts failed to prove the requisite motive element of the plaintiff's claim. *Id.* at 1333.

In *Hoard v. Sizemore*, 198 F.3d 205 (6th Cir. 1999), nineteen former county employees brought a free speech retaliation claim against several defendants on the grounds that the newly-elected county Judge-Executive did not renominate them for employment in retaliation for their failure to support his campaign. Defendant Sizemore moved for summary judgment based on qualified immunity, and the district court denied his motion on the grounds that "there is still a question of whether the positions . . . were imbued with the discretionary and/or confidential access to the Judge-Executive so as to warrant a reasonable belief that the exception [to the rule that employees cannot be fired on the basis of political affiliation] was applicable." *Id.* at 211.

On interlocutory appeal, the Sixth Circuit cited *Johnson* and found that the undisputed material facts showed that four plaintiffs failed to state a First Amendment political patronage claim in the first instance. *Id.* at 211-16. However, the court declined to extend jurisdiction over the remaining fifteen plaintiffs because the District Court made a specific determination that a genuine issue of material fact existed as to Sizemore's motivations for discharging them. *Id.* at 220. Sizemore argued that his conduct was objectively reasonable, and he should therefore be entitled to qualified

immunity. *Id.* at 217. Citing *Crawford-El*, the court rejected that argument on the grounds that it was merely an attempt to "transform the factual issue of motivation into the legal question of objective reasonableness." *Id.* at 218.

Hoard is distinguishable from *Lukan*, but entirely consistent with the Court's decisions in *Johnson* and *Crawford-El*. Contrary to *Hoard*, the District Court in *Lukan* did not indicate its reasons for denying Scott and Brisco's qualified immunity. Therefore, the Fifth Circuit was free to review the record on appeal and determine that the undisputed material facts did not show a constitutional violation irrespective of Scott and Brisco's motivations. Furthermore, the issue of motive in *Hoard* centered upon an individual judge, while the motives of Scott and Brisco were not material to the Fifth Circuit's analysis because there is absolutely no evidence that Scott or Brisco exerted any influence over the interview committee's decisions. Therefore, *Hoard* also does not contribute to any alleged conflict in the Courts of Appeals.

Supreme Court Rule 10 states that a petition for a writ of certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Not only did the cases cited by Petitioner correctly state the applicable rules of law — they correctly applied them. There is no conflict in the Court of Appeals in their interpretation of *Crawford-El*, and the Petition for Writ of Certiorari should therefore be denied.

III. The Fifth Circuit Only Addressed Questions Of Law.

Petitioner also argues that the Fifth Circuit's adherence to the qualified immunity doctrine "supplanted" his Seventh Amendment right to a trial by jury because the Fifth Circuit made a determination as to causation. Petitioner's argument is meritless because the Fifth Circuit only addressed questions of law.

The Seventh Amendment "was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details." *Galloway v. United States*, 319 U.S. 372, 392 (1943). At the core of these fundamental elements is the right to have a "jury *ultimately* determine the issues of fact if they cannot be settled by the parties or determined as a matter of law." *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1178 (5th Cir. 1979) (emphasis in original) (citing *In re Peterson*, 253 U.S. 300 (1920)).

In the case at bar, Petitioner was not deprived of his Seventh Amendment right to a trial by jury because the Fifth Circuit determined only questions of law. *Johnson* held that a Court of Appeals on interlocutory appeal from the denial of qualified immunity may address the purely legal question of whether a given set of facts violates clearly established law. *Johnson*, 515 U.S. at 313-14. In order to show a violation of clearly established law, Petitioner had to first provide some evidence of each element of his First Amendment claim. *See Siegert*, 500 U.S. at 232. After reviewing the undisputed facts in the record, the Fifth Circuit found that Petitioner had no evidence of causation, and therefore failed to show a violation of his constitutional rights. *Lukan*, 183 F.3d at 346. Petitioner's Seventh Amendment right to a jury trial was

therefore not "supplanted." *Id.* at 345 ("As we are addressing only conclusions of law, we may exercise appellate jurisdiction over this interlocutory appeal.").

IV. The Lack Of Finality In The Judgment Below Warrants A Denial Of Certiorari.

The Petition for Writ of Certiorari should also be denied because a final judgment has not been rendered in this case. This Court has previously stated that it will not ordinarily issue a writ of certiorari to review a decision of the Courts of Appeals on appeal from an interlocutory order "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893). One Supreme Court justice has even stated that it is the "normal practice" of the Court to deny interlocutory review. *See Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting).

There is no "extraordinary inconvenience" that would be suffered by Petitioner based on the Fifth Circuit's granting of qualified immunity to Scott and Brisco because Petitioner still has a free speech retaliation claim pending against NFISD. Therefore, the Court's review of the Fifth Circuit's decision in *Lukan* may not affect the ultimate outcome of this case. As former Justice Brennan once wrote:

> [W]e have made mistakes in granting certiorari at an interlocutory stage of a case when allowing the case to proceed to its final disposition below might produce a result that makes it unnecessary to address an important and difficult constitutional question. . . . Surely we should discipline

> ourselves to be more faithful to the *Ashwander* principle not to address constitutional issues if there is a way to properly avoid doing so.

JUSTICE BRENNAN, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983).

CONCLUSION

For the above reasons, the Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED DECEMBER 12, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H 97 3306

OLUFEMI ANTHONY LUKAN,

Plaintiff,

vs.

NORTH FOREST I.S.D.
GLORIA SCOTT, AND
L. V. BRISCO

Defendant.

ORDER

Before the Court is the plaintiff's complaint, the defendants' motion for summary judgment, and the parties respective responses. After a careful and thorough review of the parties submissions and the applicable law, the Court denies the defendant's motion for summary judgment because there are several material fact issues, which necessitate a trial for their proper resolution.

Signed this 12th day of December, 1998.

/s/ *Kenneth M. Hoyt*
KENNETH M. HOYT
United States District Judge